KHEAMHUAT HOLDINGS SDN BHD A

v.

THE INDIAN ASSOCIATION, PENANG

COURT OF APPEAL, PUTRAJAYA B
MOKHTAR SIDIN JCA
DENIS ONG JCA
MOHD NOOR ABDULLAH J
[CIVIL APPEAL NO. P-02-346-2000]
28 APRIL 2006 C

CONTRACT: *Formation - Subject to contract - Arrangement made 'subject to contract' or 'subject to preparation and approval of a formal contract' - Whether legally binding agreement created before execution of formal agreement* D

COMPANY LAW: *Memorandum of association - Compliance with memorandum and articles of association - Effect of non-compliance - Memorandum akin to statute of incorporation*

COMPANY LAW: *Memorandum of association - Waiver - Whether requirement in memorandum and articles of association can be waived by assent of general body or by estoppel* E

COMPANY LAW: *Memorandum of association - Construction of clauses - Whether ordinary rules of construction of documents applicable* F

UNINCORPORATED ASSOCIATIONS: *Club - Management - Sub-committees - Whether sub-committees can operate independently of management committee*

The respondent (a non-profit organization) was incorporated under G the Companies Ordinance 1924 as a company limited by guarantee. The respondent planned to build a clubhouse on its land ('the subject land'). At all times, the respondent was managed by a management committee elected at its annual general meeting ('AGM'). From 1983 to 7 July 1994, SP4 was the President of H the management committee. At the respondent's AGM held on 26 June 1994, a new management committee was elected and SD1 was chosen as the President.

The respondent's building sub-committee under SP4 had executed I a Memorandum of Understanding ('MOU') with the appellant for the construction of the clubhouse. The appellant deposited the sum of RM30,000 on signing the MOU. As required by the

A respondent's Memorandum and Articles of Association ('M&A'), cls. 3(1) and 3(2) of the MOU provided that the MOU was being entered into subject to: (a) obtaining the consent of the General body to the said proposal; (b) consent of the High Court; (c) a final agreement being concluded between the parties after their B lawyers have studied and advised on the matter; and (d) any amendments that may be made by the respondent to the building plans. There was no evidence to show that a resolution was passed to approve the MOU. The respondent also did not go to the High Court to obtain its consent. Instead, the respondent had C in its AGM resolved to waive the court's consent. After signing the MOU, both parties had appointed solicitors to negotiate and draft a formal agreement. In the midst of exchanging drafts, the appellant's solicitor wrote to the respondent's solicitors stating that the appellant had instructed her to abort the agreement since the D appellant was not interested in developing the subject land anymore. As a result, the respondent's new management committee treated the MOU as had been terminated and attempted to return RM30,000 paid by the appellant.

E Before the AGM of 26 June 1994, SP4 had taken out the building sub-committee from the control of the management committee and made it a permanent sub-committee of which he was made the permanent chairman. Despite the abortment of the MOU by the appellant, the building sub-committee headed by SP4 F met to finalise the terms of the agreement. Because of this, the new management committee revoked the independency of the building sub-committee and terminated the MOU. Subsequently, the appellant took up the present action claiming, *inter alia*, a declaration that the MOU was a valid and binding contract and G specific performance by the respondent of the MOU. The High Court dismissed the appellant's claim and hence, this appeal.

Held (dismissing the appeal with costs)
Per Mokhtar Sidin JCA:

H **(1)** Where an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract', it would be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged. The MOU in the present case made it I very clear that the MOU was subjected to a final and formal agreement between the parties. Following the principle stated in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprise*

Sdn Bhd, the MOU was nothing more than a basis for negotiations and the parties did not intend to be bound by the MOU until a formal agreement was executed. There was no legally binding contract between the parties until the execution of a formal agreement. (paras 28 & 29)

(2) Even if the respondent had in its EGM waived the requirement to obtain the consent of the court, that would be meaningless because it would be *ultra vires* cl. 32(i) of the M&A. The M&A is the respondent's constitution and the provision must be complied with. Non-compliance with the provision would be *ultra vires* and void. To get away from this, requirement cl. 32(i) had to be amended. Until the consent of the court was obtained, there was no agreement, immaterial of whether the parties had agreed and executed a formal agreement. (paras 32 & 33)

(3) An attempted departure from the provisions of the M&A is as invalid as if the memorandum were a statute of incorporation, it is *ultra vires* of the company and cannot be validated by assent of the members at a general meeting or by taking judgment against the company by consent or by estoppel. In construing the objects and the clauses of the M&A, the ordinary rules of construction of documents are equally applicable. There is no special rule of interpretation by reference to what are supposed to be the main or principal objects of a company where the question is whether something done or proposed to be done is *ultra vires*. (para 46)

(4) The building sub-committee cannot operate independently of the management committee. There was no provision under its M&A for the establishment of any sub-committee independently of the management committee. Until the M&A was amended to allow a sub-committee independently of the management committee, its establishment would be *ultra vires* of the M&A. (para 49)

(5) Since the building sub-committee cannot act independently of the management committee, the declaration by SP4 that the building sub-committee had accepted the second agreement was not binding on the management committee or the respondent. (para 49)

A ***Bahasa Malaysia*** *translation of headnotes*

Responden (sebuah pertubuhan yang bukan membuat untung) telah diperbadankan di bawah Ordinan Syarikat 1924 sebagai sebuah syarikat terhad oleh jaminan. Responden telah bercadang
B untuk membina sebuah rumah kelab di atas tanahnya ('tanah tersebut'). Pada semua masa, responden telah diuruskan oleh satu jawatankuasa pengurusan yang dilantik di dalam mesyuarat agung tahunannya ('MAT'). Dari 1983 hingga 7 Julai 1994, SP4 telah menjadi Presiden jawatankuasa pengurusan. Dalam MAT
C responden yang diadakan pada 26 Jun 1994, satu jawatankuasa pengurusan baru telah dilantik dan SD1 telah dipilih sebagai Presiden.

Jawatankuasa kecil bangunan responden di bawah SP4 telah
D memasuki satu memorandum persefahaman ('MP') dengan perayu untuk pembinaan rumah kelab tersebut. Perayu telah mendepositkan sejumlah RM30,000 selepas penandatanganan MP tersebut. Seperti yang diwajibkan oleh memorandum dan perkara-perkara persatuan ('M&PP') responden, klausa-klausa 3(1) dan
E 3(2) dalam MP telah memperuntukkan bahawa MP tersebut dimasukki tertakluk kepada: (a) mendapatkan kebenaran badan am berkenaan dengan cadangan tersebut, (b) kebenaran Mahkamah Tinggi, (c) satu perjanjian akhir dibuat di antara pihak-pihak setelah peguam mereka masing-masing mengkaji dan memberi pandangan
F mereka mengenai perkara tersebut, dan (d) apa-apa pindaan yang mungkin dibuat oleh responden kepada pelan-pelan bangunan. Tiada keterangan yang menunjukkan bahawa satu resolusi telah diluluskan untuk membenarkan MP tersebut. Responden juga tidak mendapatkan kebenaran Mahkamah Tinggi. Sebaliknya, responden
G telah di dalam MATnya membuat resolusi untuk mengenepikan keperluan bagi mendapatkan kebenaran Mahkamah. Selepas menandatangani MP tersebut, kedua-dua pihak telah melantik peguamcara untuk membuat rundingan dan menderafkan satu perjanjian formal. Pada ketika draf-draf tersebut sedang ditukar,
H peguamcara perayu telah menulis kepada peguamcara responden menyatakan bahawa perayu telah mengarahkannya supaya memberhentikan perjanjian tersebut kerana perayu tidak lagi berminat memajukan tanah tersebut. Oleh yang demikian, jawatankuasa pengurusan baru responden telah mengambil MP
I tersebut sebagai telah dibatalkan dan telah cuba memulangkan RM30,000 yang dibayar oleh perayu.

Sebelum MAT bertarikh 26 Jun 1994, SP4 telah mengambil keluar jawatankuasa kecil bangunan daripada kawalan jawatankuasa pengurusan dan telah menjadikannya satu jawatankuasa kecil tetap di mana SP4 telah dijadikan pengerusi tetap. Tanpa menghiraukan pembatalan MP tersebut oleh perayu, jawatankuasa kecil bangunan yang diketuai oleh SP4 telah bertemu dan menetapkan terma-terma perjanjian itu. Oleh kerana ini, jawatankuasa pengurusan baru telah membatalkan kebebasan jawatankuasa kecil bangunan dan menamatkan MP tersebut. Berikutan itu, perayu telah memulakan tindakan ini dan menuntut, *inter alia*, satu deklarasi bahawa MP tersebut adalah satu kontrak yang sah dan mengikat dan untuk pelaksanaan spesifik MP tersebut oleh responden. Mahkamah Tinggi telah menolak tuntuan perayu yang telah membawa kepada rayuan ini.

Diputuskan (menolak rayuan dengan kos)
Oleh Mokhtar Sidin HMR:

(1) Di mana satu rancangan dibuat 'subject to contract' atau 'subject to the preparation and approval of a formal contract', ianya akan diambil sebagai bermakna pihak-pihak masih sedang berunding dan tidak berniat untuk diikat sehingga satu kontrak formal dimasukki. MP tersebut di dalam kes ini telah dengan jelas menyatakan bahawa ianya tertakluk kepada satu perjanjian yang akhir dan formal di antara pihak-pihak. Mengikut prinsip di dalam kes *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprise Sdn Bhd*, MP tersebut adalah hanya satu dasar bagi rundingan dan pihak-pihak tidak berniat untuk diikat oleh MP tersebut sehingga satu perjanjian yang formal dimasukki. Tidak ada kontrak yang mengikat dari segi undang-undang di antara pihak-pihak sehingga perjanjian formal itu dimasukki.

(2) Sekiranyapun responden telah di dalam mesyuarat agung luar biasanya mengenepikan keperluan untuk mendapatkan kebenaran mahkamah, ini adalah tidak bermakna kerana adalah *ultra vires* klausa 32(i) M&PP. M&PP adalah perlembagaan responden dan peruntukkannya mestilah dipatuhi. Ketidakpatuhan dengan peruntukkannya adalah *ultra vires* dan tidak sah. Untuk mengelak daripada keperluan ini, klausa 32(i) perlu dipinda. Sehingga kebenaran mahkamah didapatkan, tiada perjanjian wujud, tidak kira sama ada pihak-pihak telah bersetuju dan menandatangani perjanjian formal.

(3) Percubaan untuk mengelakkan peruntukkan-peruntukkan M&PP adalah tidak sah seolah-olah memorandum itu adalah suatu akta pemerbadanan, ianya adalah *ultra vires* syarikat dan tidak boleh disahkan oleh kebenaran ahli-ahli di dalam mesyuarat agung atau dengan mengambil penghakiman terhadap syarikat dengan persetujuan atau melalui estoppel. Dalam mentafsirkan objek-objek dan klausa-klausa M&PP, rukun-rukun biasa pentafsiran dokumen adalah terpakai. Tidak ada rukun pentafsiran yang khas yang merujuk kepada apakah objek utama syarikat di mana soalnya adalah sama ada sesuatu yang dilakukan atau dicadangkan dilakukan itu adalah *ultra vires.*

(4) Jawatankuasa kecil bangunan tidak boleh beroperasi secara bebas daripada jawatankuasa pengurusan. Tidak ada peruntukkan di dalam M&PPnya untuk penubuhan mana-mana jawatankuasa kecil yang bebas daripada jawatankuasa pengurusan. Sehingga M&PP tersebut dipinda untuk membenarkan satu jawatankuasa kecil yang bebas daripada jawatankuasa pengurusan, penubuhannya adalah *ultra vires* M&PP.

(5) Oleh kerana jawatankuasa kecil bangunan tidak boleh bertindak secara bebas daripada jawatankuasa pengurusan, deklarasi oleh SP4 bahawa jawatankuasa kecil bangunan telah menerima perjanjian kedua itu adalah tidak mengikat jawatankuasa pengurusan atau responden.

Case(s) referred to:

Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy [1996] 3 CLJ 393 HC ***(refd)***

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(foll)***

Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 BLJ 9 SC ***(refd)***

Lim Hong Liang & Anor v. Tan Kim Lan & Anor [1997] 4 CLJ 175 HC ***(refd)***

Public Bank Bhd v. Metro Construction Sdn Bhd [1991] 1 CLJ 787; [1991] 3 CLJ 479 HC ***(refd)***

For the appellant - Anad Krishnan (Renu Zechariah with him); M/s Anad & Noraini

For the respondent - RR Sethu (R Rajasingam & N Shanmugam with him); M/s R Rajasingam & Company

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-261-1995]

Reported by Amutha Suppayah

JUDGMENT

Mokhtar Sidin JCA:

[1] In this appeal, the appellant (the plaintiff in the court below) sought the following reliefs:

1. A declaration that the Memorandum of Understanding (MOU/P28) dated 12 December 1992 entered into between the parties, is a valid and binding contract.

2. Specific performance by the defendant of the MOU.

3. An injunction restraining the defendant or its agents from taking any steps to call in new tenders for the development of the defendant's subject land described as Lot 166, Section 1, Georgetown (hereinafter referred to as "the subject land").

4. An injunction restraining the defendant to develop or award any contract for the development of the subject land.

5. Where an award to develop the subject land had been given to another party an injunction to stop the defendant from taking any steps in the development of the subject land.

The High Court dismissed the appellant's claim and being dissatisfied with that decision, the appellant appealed to this court. The facts:

[2] The respondent, the Indian Association, Penang (hereinafter referred to as "the Association") is a non profit organisation and was incorporated on 23 April 1924 under the Companies Ordinance 1924 as a company limited by guarantee. The Association's Memorandum and Articles provide very wide and various objects. Its main object is as a social club for members who are all of Indian descent. Another object of the Association is to provide for its members a clubhouse with the usual club facilities in games and sports, entertainment and dining. Towards this end the Association had acquired a piece of land (the subject matter of this appeal). The Association's Memorandum and Articles also allow it to create debenture, charges or leases in pursuit of its objects. The Association had been planning to build the clubhouse on that piece of land (hereinafter referred to as "the subject land").

[3] At all times, the Association is managed by a management committee elected by the members at its annual general meeting (AGM). The elected management committee members will choose amongst themselves a chairman, which is known as the President of the Association. From 1983 to 7 July 1994 (except for the year 1988), the President of the Association was one Samuel J Devagnaman also known Sam Mathuram (SP4). At the Association's AGM held on 26 June 1994, a new management committee members were elected and SP4 was one of them. When the new management committee met to elect the President, the committee members chose SD1 (Mr. V. Mohan) to be the President of the Association instead of SP4 who was the incumbent.

[4] Under its Memorandum and Articles of Association, the management committee is permitted to establish several sub-committees to run the affairs of the Association. The sub-committees are answerable to the management committee. The sub-committees could not make any decision which would bind the management committee or the Association. The sub-committees could only make recommendations or offer advice to the management committee. One of the sub-committees is known as the building sub-committee whose function is to look into the feasibility of building a clubhouse on the subject land. Traditionally, the President of the Association would be the chairman of the building sub-committee.

[5] As I have stated earlier, the Association had been toying with the idea of building its own clubhouse even before SP4 became the President of the Association. Though SP4 had been the President much earlier, it was only in 1991 that the sub-committee attempted to solicit offers to develop the subject land. Several offers were received and finally the management committee shortlisted the offer by a company called Sobena. This was then brought to the members at a general meeting held on 12 April 1992, but the members rejected it when it was discovered that Sobena was financially unsound. The management committee then made another attempt by advertising the proposal to develop the subject land on 2 June 1992. As a result of that advertisement the management committee received 28 offers. The management committee then issued questionnaires to those who made the offer. When the answers were received the building sub-committee shortlisted four companies whose offers were considered to be

concrete, one of which was Tri-Den Construction Sdn Bhd. Apparently, the appellant took over the offer made by Tri-Den Construction Sdn Bhd. This was made possible because SP1 (one Lee Cheow Kheam) who was also a director of Tri-Den Construction was also the chairman and managing director of the appellant. He was the chairman of another company known as Paradise Properties Sdn Bhd which would come into the picture later on. The appellant in their answers to the questionnaires outlined a skeletal proposal on the building project. After the answers to the questionnaires were received only two offers were accepted, one was the offer by the appellant and the other was by Kwan Joo Development Sdn Bhd. After receiving the offers the building sub-committee prepared a MOU dated 12 December 1992 for the consideration of the two offerors (ie, Kwan Joo Development Sdn Bhd and the appellant). According to SP4, the MOU was prepared by him and SP5 (Mr. Muruggapan). Both the appellant and Kwan Joo Development were told to sign the MOU if they agreed. Kwan Joo Development did not sign the MOU. The appellant did sign the MOU and also deposited the sum of RM30,000 as required on signing the MOU. The MOU itself is rather lengthy and since there is no dispute on the contents there is no necessity for me to cite it here. Suffice for me to refer to some of the provisions when I feel that it is necessary. The dispute between the parties is not the contents but the MOU itself. The appellant claimed that the MOU is the contract which is binding on the Association and the appellant.

[6] Before proceeding, I would like to refer to the provision relating to immovable property and real estate of the Association which is found in cl. 32(i) of the Memorandum and Articles of Association which provides:

> 32(i) To do all such things as are incidental or conducive to the attainment of the above objects provided that in case the Association shall possess or acquire any immoveable properties or real estate, *the Association shall not sell, lease, transfer or divest such property without the prior approval of 2/3 of the paid up members present at a general meeting and in addition subject to the consent of the court.* (emphasis added).

The provision imposes certain restrictions on the Association when it wishes to deal with any of its immovable property or real estate. Before dealing with the immovable property or real estate, the Association was required to get the approval of 2/3 of the members present at the general meeting specially convened to deal

with that property or real estate and the consent of the court. The 2/3 majority must be members who have paid the entrance fees, the subscriptions and other dues. In my view, those are safeguards purposely enacted to prevent members having underhand dealings.

[7] Recognising the above restrictions, the MOU spelt out those restrictions in cls. 3(1) and 3(2):

> 3. And whereas it is the intention of the parties herein to enter into this Memorandum of Understanding subject to:
>
> 1. Obtaining the consent of the General body to the said proposal.
>
> 2. Thereafter the consent of the High Court.
>
> 3. A final Agreement being concluded between the parties after their lawyers have studied and advised on the matter.
>
> 4. To any amendments that may be made by the Association to the Building plans submitted by the said Company.

As can be seen from the above, sub-cls. (3) and (4) impose two other terms and conditions before the parties can come into an agreement. It is clear to me that when SP1 signed the MOU on behalf of the appellant he knew of the terms and conditions stipulated by cl. 3. In signing the MOU it means that the appellant had accepted them.

[8] According to the evidence of SP4, the MOU was tabled and approved by the members at an Extraordinary General Meeting (EGM) of the Assocciation which was held on 3 January 1993. SP4, in his evidence, stated that the MOU was discussed and approved by the majority of the members present. Apparently, SP5 confirmed SP4's evidence. The trial judge found that there was no evidence to show that a resolution was passed to approve the MOU because no minutes were produced.

[9] The evidence shows that the Association did not go to the High Court to obtain its consent though it was required by arts. 32(1) of the Memorandum and Articles of Association and cl. 3(2) of the MOU. SP4 did not dispute this and this was confirmed when he gave evidence that a proposal to amend art. 32(1) to

delete the requirement of the court's consent was discussed at the AGM held on 30 May 1993. The members decided against the proposal to amend. SP4 further stated that the AGM instead resolved to waive the court's consent. SP4 knew there is no provision in the Memorandum and Articles of Association for a waiver.

[10] It is not disputed that after the appellant had signed the MOU, both the appellant and the respondent appointed their own solicitors to negotiate and draft a formal agreement as required by cl. 3(3) of the MOU. The appellant was represented by the firm of solicitors of Stella Soo (SD2) while the respondent was represented by Messrs Presgrave & Matthews (P & M). Apparently, SD2 put up a draft agreement which was not agreed upon by P & M. SD2 then put up another draft which was again rejected by P & M. After that P & M decided to put up their own draft for SD2 to consider. While P & M were in the midst of preparing the draft, they received a letter dated 7 April 1994 (P84) from SD2 stating that the appellant had instructed her to abort the agreement. On receiving that letter P & M informed the management committee of the abortment and P & M ceased to prepare the draft. This happened just a few months before the AGM held on 26 June 1994 when a new management committee was elected. Amongst the members elected to the new management committee were SP4 and SD1. At the first management committee meeting after the AGM, the management committee elected SD1 to be the chairman of the management committee and thus became the President of the Association to replace SP4. Soon after SP4 resigned from the management committee.

[11] Turning to the abortment of the agreement, SD2 gave evidence that she was given strict instruction by the appellant to abort the agreement since the appellant was not interested to develop the subject land anymore. After giving that instruction, SD2's services with the appellant was terminated and she was paid her fees. SD2 was not cross-examined on this and her evidence was not contradicted. As a result, the new management committee treated the MOU as had been terminated and attempted to return RM30,000 paid by the appellant.

[12] Just before SD2's letter was received by P & M, P & M received a letter from Messrs G.B. Neoh Ng & Anuar offering on behalf of Paradise Properties Sdn Bhd (Paradise) to undertake the

project to develop the subject land as appeared in the newspapers advertisement. The letter was produced as exh. P88. By a letter dated 2 June 1994 (P94) a cheque for the sum of RM470,000 was sent. P & M then sent this offer to the management committee. The letter did not state anything except that they agreed to the second draft. What is important, the letter did not state that Paradise was taking over the offer made by the appellant nor did it state that Paradise and the appellant were connected. The learned judge found and concluded that P88 was totally a fresh and new offer from Paradise and had nothing to do with the offer by the appellant.

[13] One significant fact about P88 was that when P & M sent P88 to the management committee, it was received by SP4. He did not disclose P88 to some of the committee members and when he brought it up at the AGM held on 26 June 1994 the members rejected the offer.

[14] Before the AGM of 26 June 1994, SP4 succeeded in taking out the building sub-committee from the control of the management committee and made it a permanent sub-committee of which he was made the permanent chairman. This was done just before he was ousted as chairman of the management committee and President of the Association. SD1, through the EGM, brought back the building sub-committee under the control of the management committee and revoked its permanency status.

[15] Despite the rejection by the members of the offer by Paradise and the abortment of the MOU by the appellant, the building sub-committee headed by SP4 and now totally independent of the management committee met to finalise the terms of the agreement. There was no evidence to show that the Association's solicitors were present. The building sub-committee headed by SP4 not only went against the management committee who had terminated the appellant's offer, but also the AGM's decision in rejecting the offer by Paradise. One of the members of the building sub-committee gave evidence that the draft agreement was incomplete because the building plans, the layout plans, the scope of works and specifications were not annexed. Despite all that, SP4 gave evidence that the agreement was approved. Because of this the management committee through an EGM revoked the independency of the building sub-committee and terminated the MOU with the appellant.

[16] After receiving the termination letter from SD1 the appellant took up the present action. After a full trial the learned judge dismissed the appellant's claim. The appellant, being dissatisfied with that decision, appealed to this court. Before us, learned counsel for the appellant listed some of the grounds to show that the learned judge was in error. There are repetitions and overlappings of those grounds and for that reason I will list them under various headings which I feel will cover all the grounds submitted by the appellant.

The Judge Was In Error In Finding The Mou As Not Binding

[17] The record shows that the learned trial judge had scrutinized both oral and documentary evidence, in particular the MOU, and the learned judge came to the conclusion that the MOU by itself was not a complete contract. The learned judge also found that some of the terms and conditions found in the MOU were uncertain and subject to further negotiations. The learned judge came to the conclusion that the MOU was not a legally binding agreement and at the most it was only an agreement to negotiate and as such it was unenforceable. In my view, the present appeal is somewhat similar to the case of *Abdul Rahim bin Syed Mohd v. Ramakrishnan Kandasamy* [1996] 3 CLJ 393 at pp. 405-407 where Visu Sinnadurai J said:

> In the present case, the purchaser on viewing the property, expressed an interest in purchasing it. He had at this stage made no survey or technical inspection of the house, nor had he conducted any search on the title to determine whether there were any existing encumbrances on the land, or whether there were any special restrictions on the title regarding the transfer of the property. More importantly, at this stage, he had also made no financial arrangements to secure a loan for purposes of settling the purchase price. It ought to be borne in mind that the purchase price was well over half-a-million ringgit.
>
> On the part of the vendor, his intention was clear: to sell the property to whosoever wishing to purchase it, subject to certain conditions being fulfilled, namely the time schedule for the payment of the purchase price. In furtherance of this intention, it was made clear to the purchaser that if the purchaser was wishing to purchase the property, the purchaser must be willing, and be in a position, to pay the purchase price within the time frame as stated in the MOU.

It must also be observed that the memorandum of understanding contains no specific provision as to the effect of non-compliance of it by the parties, nor does it provide that until the specified date, the vendor was under an obligation not to sell the property to a third party. Further, if the MOU had stated that, in consideration of the vendor promising not to do so, the money paid by the purchaser will be forfeited if the purchaser chooses not to go on with the sale, no difficulties would have arisen.

Time and again, the courts have stated that much of these problems may be avoided if only the consequences of either party not proceeding with the contract are expressly spelt out in the initial agreement itself. Despite these words of caution, such problems continue to arise.

The plaintiff, under the memorandum of understanding, paid 1% of the agreed purchase price "as confirmation of purchase" on the date he signed the memorandum of understanding, that is September 27, 1993. The memorandum of understanding further provided that the balance of the 9% of the purchase price will be paid within eleven (11) days, thereafter, that is on the date the formal sale and purchase is to be signed. This eleven days grace period is probably given to the purchaser to raise sufficient funds to pay the balance of the 9% of the purchase price, and more importantly for the purchaser's solicitors to prepare the formal sale and purchase agreement. Within this brief period, the solicitors for the purchaser would also have to conduct the relevant searches in the land office, and also to determine the manner in which the vendor is proposing to discharge the existing charge over the land so as to enable the vendor to give the purchaser a title free from encumbrances. As to the duties of the purchaser's solicitors, see the recent Federal Court decision in *Karuppannan Chellapan v. Balakrishnen Subban and Others* [1994] 3 AMR 44:2279; [1995] 1 SCR 19.

If the purchaser's contention that an immediately binding contract came into existence is accepted, that is on the date of the signing of the memorandum of understanding, the purchaser will find himself in grave difficulties if, for example he is unable to raise the necessary funds to pay the purchase price within the stipulated time, or even if the purchaser's solicitors discover that the vendor's title to the land is subject to certain restrictions, or that the existing encumbrances created by the vendor could not be discharged, or even if it is discovered that the vendor is not the sole proprietor of the land or that he is merely a trustee, or a legal representative.

> It must be emphasised that the memorandum of understanding does not even state that the defendant is the registered proprietor of the land, nor give a description of the title.
>
> There may also be other terms which may not be acceptable to the purchaser. In any of these circumstances, the purchaser may not wish to proceed with the sale any further. And yet, if the purchaser's contention is upheld, and if he decides not to proceed with the purchase, the purchaser will be in breach of contract, enabling the vendor to sue the purchaser for damages. Clearly such was not the intention of the parties.
>
> It appears to me that considering the memorandum of understanding as a whole, and in particular, in considering the objective of the MOU, and particularly the "genesis of the agreement", and the intention of the parties at the time of the signing of the memorandum of understanding, the memorandum of understanding is not a legally binding agreement. It is no more than an agreement to negotiate, and as such, it is unenforceable.

[18] In *Lim Hong Liang & Anor v. Tan Kim Lan @ Tan Kim Leng & Anor* [1997] 4 CLJ 175, the parties entered into a memorandum of understanding (MOU) as individual shareholders. The defendants were in control of a public listed companies, UCM Industrial Bhd (UCM), and the plaintiffs claimed to have control over various companies. UCM itself was not a party to the MOU. The MOU could be divided into two parts: (i) it prescribed the introduction of profitable companies (the target companies) to be injected into UCM; and (ii) the intended sharing of benefits consequent to the injection. The plaintiffs claimed that the MOU was a legally binding contract, and claimed from the defendants compensation in respect of breaches of the MOU committed by the defendants. On the other hand, the defendants contended that the MOU was not a legally binding contract, and as such the plaintiffs had no enforceable rights. The MOU prescribed the nomination of the target companies by the defendants and to enter into *bona fide* negotiations in respect of the sale and purchase agreement with the target companies. This the defendants failed to do. The plaintiffs further alleged that there were various *mala fide* acts done by the defendants relating to negotiations with third parties. The issue before the court was whether the MOU was a legally binding contract, and if not, whether the first part of the MOU did give enforceable rights to the plaintiffs. Haidar J (as he then was) stated at pp. 178-181:

A The law

I agree that in construing whether a document has legal effect or not, the label attached to the document say, 'memorandum of understanding', is not the criteria for construing such a document. In this regard, the Court of Appeal in *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1995] 3 MLJ 141 in quoting with approval the case of *Addiscombe Garden Estates Ltd v. Crabbe* [1958] 1 QB 513 at p 528; [1957] 3 WLR 980 at p 981) said at p 147:

> No doubt it is described as a guarantee. But in the construction of contracts, the court is not bound by the labels that parties choose to affix onto the particular document. In all such cases, the duty of the court is clear. And that duty is to construe the documents as a whole and to determine from its language and any other admissible evidence its true nature and purport.

It would then be prudent for me to consider the terms of the first part of the MOU and see whether the parties intended to enter into a legally binding relationship, the breach of which would give rise to enforceable rights as claimed by the plaintiffs. In other words, the court will have to determine from its language and any other admissible evidence its true nature and purport. In this regard, the admissible evidence to be considered would be the CABD, which was agreed to by both parties for the purpose of determining the issue as framed.

In considering the MOU, it is appropriate for me to examine the opening paragraphs of the MOU so as 'to ascertain what common intentions should be ascribed to the parties from the terms of the documents and the surrounding circumstances' (per Ralph Gibson LJ in *Kleinwort Benson Ltd v. Malaysia Mining Corp Bhd* [1989] 1 All ER 785 at p 789).

After stating the recitals in the MOU, it is thereafter stated at p 2 (p 4 of the CABD):

> In consideration of the above premises, this memorandum of understanding hereby sets out the parties' understanding, or some of the preliminary matters to be dealt with prior to the parties' finalization of the terms and conditions of the formal agreements relating to the transactions hereby contemplated.

The transactions contemplated are set out thereon.

From the above, it seems to me that the parties intended the MOU to be subject to a formal contract to be executed by both parties after the finalization of the terms and conditions. Until such time, the MOU is not intended to be legally binding on the parties. In this respect, the Supreme Court in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprise Sdn Bhd* [1994] 2 MLJ 754 at p 765 said:

> But it is not well settled that when an arrangement is made 'subject to contract' (see *Rossdale v. Denny* [1992] 1 Ch. 57; [1921] 90 LJ Ch 204) or 'subject to the preparation and approval of a formal contract' (see *Winn v. Bull* [1877] 7 Ch C 29) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless, and until a formal contract is exchanged.

After having stated as above, the Supreme Court went on to consider a number of authorities with finally citing at p 767 the case of *Crossley v. Maycock* [1874] 43 LJ Ch 379; [1874] LR 18 Eq 180 where Sir George Jessel MR said:

> If the agreement is made subject to certain conditions then specified or to be specified by the party making it or his solicitor, then until those conditions are accepted, there is no final agreement such as the court will enforce.

It has to be borne in mind that the MOU was entered into by the parties individually as shareholders. No doubt the defendants were in control of UCM but UCM itself is not a party to the MOU. As for the plaintiffs, they claimed to have control of various companies and purportedly proposed to arrange for the takeover of target companies by UCM without prescribing them in the MOU.

I do not think that it can be disputed that by the nature of the terms and conditions in the takeover of the target companies allegedly in control of the plaintiffs by UCM through the defendants, there would be the necessity of getting approvals from some relevant authorities as well as the board of directors and shareholders of UCM and the target companies. UCM is a public listed company. ...

...

It would seem clear from the various clauses referred to by me that the MOU was an agreement to contract or an agreement to negotiate. In this respect, Lord Denning MR in *Courtney & Fairbairn Ltd v. Tolaini Brothers (Hotels) Ltd & Anor* [1975] 1 WLR 297 at p 302 held:

> ... I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.

In *MN Guha Majumder v. RE Donough* [1974] 2 MLJ 114, the learned judge at p 116 said:

> It is a well-established rule that the parties must make their own contract, and this means that they must agree to its terms with sufficient certainty. If the terms are unsettled or indefinite, there will be no contract (*Chitty on Contract* (23rd Ed) Vol 1 para 83).

Taking into consideration the totality of the terms and conditions set out in the MOU, I am of the opinion that the parties did not intend to create a legally binding contract in view of the various approvals that needed to be obtained and the various uncertainties and the process of negotiations that needed to be carried out.

[19] In my view, the facts in the present appeal are somewhat similar to those in the above two cases. The preamble and terms of the MOU in the present appeal also require the existence of an agreement to be concluded. Recitals 2 and 3 of the MOU provide:

> 2. And whereas the Association had decided to develop the said land by selling part of it with the prior approval of the General body at an E.G.M. together with the consent of the High Court on terms mentioned herein (hereinafter referred to as "the said proposal").
>
> 3. And whereas it is the intention of the parties herein to enter into this Memorandum of Understanding subject to:
>
> 1. Obtaining the consent of the General body to the said proposal.
>
> 2. Thereafter the consent of the High Court.
>
> 3. A final Agreement being concluded between the parties after their lawyers have studied and advised on the matter.

4. To any amendments that may be made by the Association to the Building plans submitted by the said Company.

[20] The MOU envisage an agreement to be concluded between the parties and that agreement to be binding on the parties and not the MOU. For that reason I find that the learned judge was correct in concluding that the MOU was not a legally binding contract.

[21] With the greatest respect to the learned counsel, he was referring to the drafts which were not agreed upon and I am not sure how many drafts were there. According to the evidence, SD2 prepared the first two drafts which were rejected by P & M and after that P & M wanted to prepare the draft to present to SD2. SD2 wrote a letter informing P & M that the appellant had aborted the contract and P & M then ceased to continue with the draft. My understanding is that there were altogether three drafts, two of which were rejected and one in the midst of preparing. As such none of the drafts had been agreed upon. I am at a loss that the learned counsel for the appellant, being a senior lawyer, referred to the unconcluded drafts to bind the parties. The very word "draft" is an indication that it is not a concluded agreement. Even conceding the counsel was right, cl. 9 was only in the drafting stage and was not agreed upon by the parties. The draft by P & M (in my view the third draft) was not even ready to be presented to SD2 when the appellant aborted the contract.

[22] The respondent, on the other hand, submitted that the MOU itself negate the existence of an immediately binding and enforceable contract because Recital 3(3) above clearly states that: "subject to … a final agreement being concluded between the parties after their lawyers have studied and advised on the matter". The respondent further submitted that cl. 4 of the recital made it plain that any proposal in particular the building plans might not be acceptable to the respondent. The agreed building plans would be attached to the final agreement to be executed by the parties. The respondent also submitted that there was a need for the quantity surveyor to be jointly appointed to work out the cost under Recital 6 and this had not been implemented yet. The respondent contended that the legal principle is clear, as long as there is substantial or further terms and conditions remained to be agreed, then there is no concluded and enforceable contract. As such the MOU is not a concluded and enforceable contract.

[23] Perusing the MOU as a whole, I find the MOU itself is subject to a formal agreement which was to be negotiated, prepared and agreed by the parties through their respective solicitors. For the above reasons, we find that the learned judge was correct in coming to the conclusion that the MOU by itself is not a contract legally binding between the parties. It was only an agreement to negotiate.

[24] The appellant was fully aware of this and that was the reason why the appellant, after signing the MOU, engaged the services of Stella Soo to prepare and negotiate a formal agreement with the solicitors representing the respondent. The basis of the negotiations is the MOU. If the MOU is a binding contract by itself then there was no necessity for the parties to negotiate and prepare an agreement. There was also no necessity to appoint solicitors to negotiate and prepare an agreement.

[25] As I have stated above, as long as substantial terms and conditions remained to be agreed and fulfilled then there cannot be a concluded or enforceable contract as stated in *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 BLJ 9 (SC) and *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 (FC).

[26] In *Kam Mah Theatre Sdn Bhd*, the respondent claimed to have entered into a binding agreement with the appellant for the sale of certain lands (the land), relying on a letter (the said document) addressed from the appellant, as vendor, to the respondent, as purchaser. The terms of the said document contained a proviso, namely, 'that the sale and purchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989', otherwise the deposit was to be refunded to the respondent. A sale and purchase agreement was subsequently prepared and signed by the respondent only, and sent to the appellant's solicitors. The agreement included two new conditions, to which the appellant did not agree, and it therefore refunded the respondent's deposit. Prior to the hearing of the action in the High Court, the respondent obtained an order for, *inter alia*: (i) the redemption sum of the land (RM2.48m) to be paid directly to Malayan United Finance Bhd (the chargee); and (ii) the titles of the land to be retained in court after their release by the chargee. The respondent did, in fact, pay the sum of

RM2.4m to the chargee, pursuant to the order. The appellant contended that there was no binding contract and that it was still then negotiating with the respondents. The trial judge found that there was a binding and concluded agreement and ordered specific performance. The appellants appealed. The Supreme Court allowed the appeal and held that:

(1) There was no contract at all, because the said document was dependent on the signing of a formal contract to be further negotiated and approved by both parties. The proviso in the said document was very similar to the phrase or formula of 'subject to contract'. There need not be the very words of the said formula in order to have the usual effect arising from the use of such formula.

(2) The words 'usual terms and conditions' failed to reveal certainty and were too ambiguous. What would be the usual terms and conditions remained largely a matter of conjecture, thus the words would create uncertainty unless a contract containing these agreed 'usual terms and conditions' had been signed by the parties.

(3) It is settled that the formula of 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract and it requires cogent evidence to displace this strong presumption. On the facts of this case, there was cogent evidence to show that negotiations were still ongoing between the parties, including: (i) the provision of the return of the deposit on the failure of the parties signing the contract by 18 March 1989; (ii) the agreement which was signed by the plaintiff only, containing two more conditions; (iii) there could have been a further amended draft of the ultimate agreement to take account of withdrawal of the compulsory acquisition over part of the land; and (iv) the correspondence after the date of the said document."

[27] In *Ayer Hitam Tin Dredging Malaysia Bhd (supra)*, the respondent, YC Chin Enterprises Sdn Bhd (YC Chin), had entered into negotiations to construct low-cost houses and shophouses (the project) for the workers of the appellant, Ayer Hitam Tin Dredging Malaysia Bhd (AHTD). AHTD wrote a letter to YC Chin on 19 September 1984 (the letter), accepting their proposals in respect of the project. Subject to certain terms and conditions, one of which was that the terms and conditions in the letter were to be appropriate indemnity clauses in favour of AHTD be incorporated in the agreement. In reliance upon the letter, YC

Chin proceeded to perform some of their obligations stated therein, although no formal agreement in writing had been executed. Subsequently, AHTD instructed YC Chin to cease all work, stating their intention to discontinue negotiations and that any work done had been entirely at YC Chin's risk. AHTD contended that the work had been done before the coming into being of any contract and that the letter was part of ongoing negotiations for a future agreement. On the other hand, YC Chin submitted that all essential terms had been agreed and all that remained to be done was to put the terms into the form of a contract. The trial judge found that there was a contract and allowed YC Chin's claim for breach. AHTD appealed to the Supreme Court. The primary issue was whether there was a concluded contract between AHTD as employer and YC Chin as contractor. Allowing the appeal, the Supreme Court held:

(1) The existence of an agreement depends upon the intention of the parties, who must be *ad idem*. It may be inferred from the language used, the parties' conduct having regard to the surrounding circumstances and the object of the contract. The court will generally apply an objective or reasonable man test.

(2) Merely because the parties contemplate the preparation of a formal contract, that would not prevent a binding contract from coming into existence before the formal contract is signed. However, when an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract', it will generally be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged.

At p. 141, Edgar Joseph Jr. SCJ (as he then was) said:

> But it is now well settled that when an arrangement is made 'subject to contract' (see *Rossdale v. Denny*) or 'subject to the preparation and approval of a formal contract' (see *Winn v. Bull*) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.
>
> We say 'generally' because in exceptional circumstances, the 'subject to contract' formula will not be so intractable as always and necessarily to prevent the formation of a contract. (see, for example, *Richards (Michael) Properties Ltd v. Corp of Wardens of St Savious's Parish Southwark, Alpenstow Ltd v. Regalian Properties plc, Filby v. Hounsell*).

Further down at p. 142, his Lordship said: A

> Having said that, however, we consider that the case which is especially relevant to the facts and circumstances of the present appeal is *Crossley v. Maycock* where Sir George Jessel MR said:
>
> > If the agreement is made subject to certain conditions then specified or to be specified by the party making it or his solicitor, then until those conditions are accepted, there is no final agreement such as the court will enforce. B
>
> In the present appeal, it is important to note the opening para in the letter of 19 September 1984, containing as it does the vital qualifying clause: 'subject to the following terms and conditions', and, in particular, condition (vi) which states quite categorically: C
>
> > … that the above terms and conditions in the form of an agreement between YC Chin Enterprises and AHTD and that appropriate indemnity clauses in favour of AHTD in respect of material defects in site work, foundation and buildings in the project be incorporated in the said agreement. D
>
> In our view, having regard to the several essential matters which still remained to be settled between the parties to which we have referred and the letter of 19 September 1984 with its vital qualifying clause, 'subject to the following terms and conditions', one of which was condition (vi) aforesaid, the present case falls within the principle enunciated by Sir George Jessel MR in *Crossley v. Maycock*. E F
>
> It follows that the letter of 19 September 1984 on its true construction did not constitute a contract binding in law upon the plaintiff and the defendant but was only a record of terms upon which they were agreed as a basis for the negotiations of a contract. It may aptly be called a letter of intent, the characteristics of which have been accurately described by Fay J at first instance in his judgment in *Turriff Construction Ltd and Turriff Ltd v. Regalia Knitting Mills Ltd* at p 22 para 3 thus: G
>
> > As I understand it such a letter is no more than the expression in writing of a party's present intention to enter into a contract at a future date. Save in exceptional circumstances it can have no binding effect. H
>
> Later, in his judgment, he restated this proposition (at p 22 para 4) thus: I

A

> A letter of intent would ordinarily have two characteristics, one, that it will express an intention to enter into a contract in future and, two, it will itself create no liability in regard to that future contract.

B

> We would add that we have not overlooked the fact that the plaintiff had, after the receipt of the letter of 19 September 1984, conducted itself as if it considered that a contract binding in law had been concluded, as evidenced by the steps it had taken in that direction to which we have referred. However, this does not really assist in deciding the question of construction of the letter of 19 September 1984 for reasons we now give.

C

[28] I find that there are similarities between the letter of intent in the above case and the MOU in the present appeal. In the above case, the letter of intent contained only two terms to be fulfilled. The first was the execution of a formal agreement and the indemnity to be given. In the present appeal, there were several substantial conditions to be fulfilled and agreed in addition to the execution of a formal agreement. As stated in *Ayer Hitam*, an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract', it would be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged. The MOU in the present case made it very clear that the MOU is subjected to a final and formal agreement between the parties. Following the principle stated in *Ayer Hitam*, the MOU is nothing more than a basis for negotiations and the parties do not intend to be bound by the MOU until a formal agreement is executed.

D

E

F

[29] I believe the above is more than enough to dispose of the present appeal. There would be no legally binding contract between the parties until the execution of a formal agreement as stated in Recital 3(3) of the MOU. In my view, there will be no legally binding contract until the execution of a formal agreement by the parties even though the other terms and conditions have been fulfilled. Now, in the present appeal, the situation is worse, none of the terms and conditions in Recital 3 of the MOU has been fulfilled. The appellant claimed that the EGM held on 3 January 1993 unanimously decided by the respondent to accept the appellant's proposal and to waive the requirement of applying for the court's consent. The appellant also claimed that the terms and conditions of the MOU were accepted and ratified by all the members present.

G

H

I

[30] The appellant alleged that at the EGM held on 3 January 1993, it was unanimously decided by the respondent to accept the appellant's proposal and to waive the requirement for applying for the court's consent. The appellant submitted that the terms and conditions of the MOU were accepted and ratified by all the members present.

[31] It might be true that at the EGM the members were to accept the appellant's proposal but it is doubtful by unanimous decision. As can be seen from the record, the appellant was the only one who signed the MOU on 12 December 1992. Apparently, that was the only proposal brought at the EGM. The Association, in particular SP4, wanted a clubhouse for the Association. SP4 had been the President of the Association and the chairman of the building sub-committee for the last nine years and yet no clubhouse had been built. When at the EGM held on 3 January 1993 it was disclosed that there was the proposal by the appellant (the only proposal) to build the clubhouse on a joint-venture basis, the members had very limited choice either to accept the proposal or none at all. For that reason, I believe the members who wanted a clubhouse accepted the proposal. Now, as to the proposal to waive the requirement for the court's consent, I am doubtful that it was unanimously passed or for that matter was approved by the members. I say this because the appellant's counsel submitted that at the EGM also the terms and conditions of the MOU were accepted and ratified. One of the terms and conditions as found in Recital 3(2) is that the consent of the court had to be obtained. If the EGM had decided for the waiver then Recital 3(2) has to be amended or the minutes of meeting must show such a decision. Further, at a later stage, SP4 and some of the members of the Association were toying with the idea of amending cl. 32(i) of the Memorandum and Articles of Association to do away with the consent but was shot down. For that reason, there is serious doubt in my mind that the members agreed to a waiver. The learned trial judge was also of the same view and for that I find the learned judge was correct in coming to that conclusion.

[32] Even assuming that the appellent was right in that the EGM held on 3 January 1993 waived the requirement to obtain the consent of the court, that would be meaningless because it would be *ultra vires* cl. 32(i) of the Memorandum and Articles of Association of the respondent. The Memorandum and Articles of Association is the constitution of the respondent and the provision

must be complied with. Non-compliance with the provision would be *ultra vires* and void. To get away from this requirement cl. 32(i) has to be amended. As I have stated earlier, SP4 and some members wanted to amend that provision but had to abandon it when they faced stiff opposition from some, if not, most of the members. The members knew that provision was put in to protect the rights of the members in respect of immovable property and real estate.

[33] It is not disputed that neither SP4 nor the management committee made any attempt to obtain the consent of the court. In my view, until this requirement is met, there would be no agreement, immaterial of whether the parties have agreed and executed a formal agreement.

[34] Going through the records, it is clear to me that the learned judge considered the surrounding circumstances and in particular the various drafts and discussions that went on since the execution of the MOU, the learned trial judge found that the parties had not reached an agreement. There were still certain obligations under the MOU to be performed by the appellant and the respondent. The learned judge found the obligations to be carried out were not performed in particular the obligations under Recital 3. As such the learned judge was correct in coming to the conclusion that the MOU could not be an agreement. It is only an agreement to negotiate.

The Abortment Of The Contract By The Appellant

[35] It was the contention of the appellant that the learned judge had erred in finding that Stella Soo's letter dated 7 April 1994 (P88) had aborted the agreement (the deal) and that the learned judge had failed to consider sufficiently the relevance of the evidence. On this issue the learned judge stated in his judgment:

> After SP4 signed the MOU on behalf of the defendant, there were exchanges of draft agreements between the parties solicitors. The plaintiff was represented by lawyer Stella Soo (SD2) and the defendant by the firm of Presgrave and Matthews (P & M). Stella Soo prepared a first draft (P38) which contained various blanks on matters still under negotiation. Two other drafts were prepared ie P40 and P45, the latter forwarded to the defendant's solicitor was described as a draft which in my view, suggested that no concluded agreement had been agreed to. This is supported by the response of P & M to those drafts. P & M were not happy with Stella Soo's draft and decided to produce its

own (P148) which was completely different from the plaintiff's draft. On 7.4.94, Stella Soo wrote a letter to the defendant (P84) stating that the agreement was aborted by the plaintiff. SP1 in his evidence stated that the plaintiff had not intended to abort the agreement but that he merely wanted to change solicitors but had lied to Stella Soo about it since Stella Soo's husband was then an engineer with one of the approving authorities (ie Majlis Perbandaran Pulau Pinang) and could cause the plaintiff problems if he had found out that his wife had been discharged from acting as the plaintiff's solicitor. SP1 said that he had explained the situation to SP4 who accepted it and had, after that, continued dealing with the plaintiff in spite of the abortment letter *vide* P84. The plaintiff, not surprisingly chose not to call Stella Soo as a witness to explain P84. Stella Soo was instead called by the defence (as SD2), and despite objections from the defence which the court overruled, she confirmed that she had received instruction from the plaintiff on her discharge and the abortment and after due settlement of her fees, she wrote P84 to inform the defendant. There was no suggestion put to SD2 during cross-examination that P84 was actually intended for a change of solicitor, and not an abortment of undertaking the building project by the plaintiff. In the face of this contradictory evidence, I came to a conclusion that SP1's explanation on the abortment letter had been substantially mitigated and damaged, and as such he had failed, on a balance of probabilities, to discharge the burden of proof on this issue. I agree with the defence, in submission, when it was said that in the absence of any challenge the plaintiff was bound by what his previous solicitor had testified about the abortment. P84 was also never presented to the BSC, according to SD3.

SP1 also explained that he had wanted to retain the services of a more senior solicitor. Thus, after terminating Stella Soo, the firm of GB Neoh Ng & Anuar were employed by the plaintiff. The new solicitor wrote to the defendant stating that they were acting for PP (Paradise Properties S.B.) and there was no mention that they had taken over the matter from Stella Soo. Nor had the plaintiff, before that, written to the defendant or P & M informing them formally about the change of solicitor. In the circumstances this Court found that, even if the MOU was binding upon the parties, in view of the evidence, both documentary and SD2's testimony, the plaintiff had aborted it pursuant to P84.

PP's first letter (P88) was substantially a new offer and no reference was made to the MOU. The emergence of PP onto the scene was not made known to the members of IA or to the MC. Even the BSC was unaware of PP existence then as it was never discussed at its meetings (see the testimony of SD3, Mr. Albert

Varghese, a member of the BSC at the relevant period). It was discovered at the annual general meeting of 26.6.1994 and the IA's members took objection to PP's participation in the project. Although PP and the plaintiff, shared in SP1 a common director, the court agreed with the stand of the defence that they had to be looked at as separate legal entities since the initial offer by the defendant was to a different company ie the plaintiff. SP4 himself forsaw the problem when he advised SP1 to use KH's (plaintiff) letterheads in future correspondence. SP4 was of course aware of PP existence as he was, almost singlehandedly involved in negotiating with SP1 all along, and SP1 had been in constant touch with SP4 personally on the building project. On 14.9.1994 the BSC had a meeting (see P184) purportedly to finalise the terms of the agreement. Having scrutinised the minutes of the meeting (P184) it is my finding that no binding agreement had yet been concluded up to that point. I agree with the defence stand that there were markedly many departures in the second draft agreement discussed at that meeting from the MOU which were not approved either by the MC or the IA's general meeting. Further, the advice on the draft discussed was not sought from P & M, as was required. I also accept SD3's evidence stating that the building plans, scope of works and specifications were not annexed to the draft. SD3 was a consultant quantity surveyor of 48 years experience and was invited to sit on the BSC and entrusted with the matter of costs and quantities of the building project. It was also suggested at the BSC meeting that the draft agreement had changed some terms of the MOU and was more favourable to the IA and thus should be accepted. The BSC at that 14.9.1994 meeting accepted the second draft agreement. The question for determination is whether the BSC could decide for the MC and bind the IA?

[36] The appellant submitted that on 3 December 1992 an EGM of the respondent was convened and the MOU was circulated to all the members. The appellant also alleged that at the EGM held on 3 January 1993, it was unanimously decided by the respondent to accept the appellant's proposal to waive the requirement of the necessity of applying to court for sanction for the sale of part of the respondent's land as required under cls. 32(i) and 32(ii) of the Memorandum of Association and cl. 24(m) of the Articles of Association of the respondent and terms of P28 were accepted/ ratified by all the members present. On 4 January 1993, the respondent wrote to the appellant and informed the appellant that the respondent's members by unanimous vote had selected it to

undertake the project and also wanted to amend the building plans and asked for the second agreement to be drafted and forwarded to its solicitors, P & M.

[37] I have gone through the evidence and find that the learned judge came to the correct decision. As can be seen the finding by the learned judge in the above passage was a finding of facts. I have dealt with the waiver where I had stated that I agreed with the learned trial judge that there cannot be a waiver and I had given my reasons for doing so.

[38] It is not disputed that the EGM was held on 3 January 1993 where the MOU was circulated. It was also not disputed that the appellant was the only applicant since Kwan Joo Development Sdn Bhd did not sign the MOU. It might be true that the respondent accepted the appellant to be the proposed developer subject to the terms and conditions as stipulated in the MOU especially in the recitals. When the respondent accepted the proposal, it does not mean that the terms and conditions could be done away. In my view, the acceptance by the members is subjected to all the terms and conditions to be complied with. I have pointed out that at least two of the terms and conditions have not been complied with, ie, the consent of the court and the execution of a formal agreement. As I have said earlier, the appellant wanted to overcome the consent by a waiver which there was no evidence that it was so and even if there was a waiver it would be ultra vires.

[39] As to the execution of a formal agreement, the evidence is so clear that there was none. In fact, the negotiations and the preparation of the agreement were abandoned when SD2 wrote the letter (P88) to P & M informing the latter that she had received instruction to abort the agreement and ceased all negotiations. This happened when SD2's two drafts were rejected by P & M and P & M undertook to prepare their own draft to be presented to SD2. This is the evidence of SD2 in court. She was not cross-examined on this, meaning that it was true that the appellant had instructed her to abort the agreement. The evidence shows that there was no repudiation of that instruction or any letter indicating that the appellant was still interested in the joint-venture. Suddenly, during the trial the appellant came up with the story as to why he gave instuction to SD2 to abort the contract. This story was supported by the evidence of SP4 and SP5.

Surprisingly, this story was never conveyed to the management committee or other members of the Association. It came out only during the trial. In my view, this piece of evidence was an afterthought to save the rights of the appellant. It is interesting to note that after P & M informed SP4 and the management committee of the abortment, no action was taken by SP4 to issue a termination notice to the appellant. Then suddenly out of the blue there was a letter of offer from Messrs G.B. Neoh Ng & Anuar on behalf of Paradise (P88) to develop the subject land on a joint-venture basis. It is to be noted that P88 was issued before the abortment letter (P84). In this respect the learned judge was correct that P88 was a new and fresh offer because it was earlier than P84. There was no mention in that letter of them taking over the project from the appellant since the MOU was still in force and not aborted yet. To complete the jigsaw the appellant came up with a story that P88 was an offer to take over the project and Messrs G.B. Neoh Ng & Anuar was senior to SD2, but no such evidence was ever adduced. The evidence of the appellant was supported by SP4 and SP5. I would not be surprised that this was planned by SP4 to help the appellant. In my view, the learned judge was right in coming to the conclusion that the abortment letter (P84) was conclusive proof that the agreement had been aborted by the appellant and that the MOU had ceased to have any effect.

Whether The Letter From Messrs G.B. Neoh Ng & Anuar Dated 24th March 1994 Created A New Contract

[40] The appellant submitted that SP4 and SP5 as members of the building sub-committee were trying to explore the possibility of the appellant using a bumiputra company to do the project. Because of that, Paradise through their solicitors, Messrs G.B. Neoh Ng & Anuar made an offer. The record shows that the building sub-committee was entrusted with the exploration of a joint-venture to develop the subject land with any company subject to certain terms and conditions. The participation of a bumiputra company was never discussed at the meeting of the Association, the management committee or the building sub-committee. This was only brought up by SP4 and SP5 during the trial. The respondent, the management committee and the building sub-committee never came up with that requirement. To me this is again an afterthought by SP1, SP4 and SP5 and brought up only during the trial to try to justify the offer by Paradise.

[41] No evidence was adduced to show that the matter of a bumiputra company's participation was brought up at the building sub-committee or the management committee. If that was so, there would be no difficulty in producing the minutes of those meetings where the matter was raised. On the contrary, the evidence shows that bumiputra participation was not a factor at all; such as when shortlisting the companies making the offer. The building sub-committee headed by SP4 shortlisted two companies, the appellant and Kwan Joo Development Sdn Bhd and both of them have no bumiputra status. Both the companies were asked to sign the MOU and to deposit a certain sum of money. The evidence shows that only the appellant signed the MOU. After the appellant signed the MOU it was brought before an EGM held on 3 January 1993 where, according to SP4, it was approved by the members. Up to that stage the question of a bumiputra company participation was never raised. SP4 and SP5 during the trial suddenly came up with the bumiputra participation when the offer from Paradise through Messrs G.B. Neoh Ng & Anuar came up. In my view, this was brought up to justify the offer by Paradise. All this came out only during the trial and not before. Perusing the records, no evidence was adduced that Paradise was a bumiputra status company. All these came as an afterthought. Anyway, this is not important because the offer by Paradise was rejected at an EGM held on 7 May 1995.

[42] The appellant submitted that the offer by Messrs G.B. Neoh Ng & Anuar on behalf of Paradise created a new contract. The evidence of SP1, SP4 and SP5 stated that Paradise was connected to the appellant and that the offer was in fact to take over the project from the appellant and that Paradise was having bumiputra status. Messrs G.B. Neoh Ng & Anuar also sent a certain sum purported to be the deposit. The appellant claimed that the reason it gave instruction of abortment was in order to appoint Messrs G.B. Neoh Ng & Anuar, a senior firm of solicitors compared to SD2. SP1, SP4 and SP5 came up with all those evidence so that Paradise would be given the project since the appellant had aborted the contract, and if the project was not given to them then the story as to why the appellant gave instruction to abort the agreement would be considered because Messrs G.B. Neoh Ng & Anuar came into the picture with the offer.

[43] The learned judge came to the conclusion that the offer by Paradise was totally a new and fresh offer. There was nothing in the offer letter that Paradise was connected to the appellant and that Paradise was taking over the project from the appellant. The submissions by the appellant that Paradise was taking over the project from the appellant would mean that the appellant had abandoned the project. In other words, the appellant's abortment of the contract was true. Looking at the evidence, I found that the offer by Paradise was made on 24 March 1994 to P & M who in turn sent it to the management committee of which SP4 was the chairman. The letter sent by SD2 to P & M in respect of the abortment was dated only on 7 April 1994 and would be received by P & M much later. This letter was also sent to the management committee. The chronology did not support the appellant's evidence that Paradise was taking over the project from the appellant because when the offer letter from Paradise came the project was still with the appellant. If it was true that Paradise was taking over the project from the appellant then the letter should mention it because for all intents and purposes the project was still with the appellant subject to certain terms and conditions. I have stated earlier as to the evidence of a bumiputra status company and the seniority of Messrs G.B. Neoh Ng & Anuar. Taking into consideration all the evidence, I am of the view that the learned judge was correct in concluding that the offer by Paradise was a fresh offer. Since the members of the Association had rejected it, there could not be a contract. It does not matter whether Paradise had accepted the second draft agreement or that P & M did not show surprise.

[44] One thing to be noted in the submissions of the appellant under this heading, as I have stated earlier, is that the appellant accepted as true that they have instructed SD2 to abort the contract on the ground that the offer by Paradise should be the offer remaining. That being the case the appellant had abandoned the MOU and it had no business to sue the respondent on the ground that the MOU was the agreement. In other words, the appellant admitted that it had no more right under the MOU. On this basis alone the appellant's action should have been dismissed.

The Court's Approval

[45] This issue was raised by the appellant under an earlier heading. This is one of the issues which have been repeated by the appellant. Under this heading the appellant raised the right of

the respondent being their own committee could waive any of the requirements such as obtaining the consent from the court. With the greatest respect to the appellant's counsel, every association and company has its own Memorandum and Articles of Association. The provisions stated in the Memorandum and Articles must be obeyed. The Association is not allowed to depart from those provisions. If the Association wishes to depart from any of the provisions then it has to amend that provision. Learned counsel apparently adopted the opinion of SP4, who is not a lawyer, that the Association could do anything even to the extent of going against the provisions of the Memorandum and Articles of Association.

[46] The respondent disagreed and submitted that the members of the Association are not permitted to do or act where the Memorandum and Articles of Association made it plain and clear that they are prohibited to do so. To support their submissions the respondent referred to the case of *Public Bank Bhd v. Metro Construction Sdn Bhd* [1991] 1 CLJ 787; [1991] 3 CLJ (Rep) 479 where it was held that a company's objects as stated in its Memorandum of Association cannot be departed from. An attempted departure is as invalid as if the memorandum were a statute of incorporation, it is *ultra vires* of the company and cannot be validated by assent of the members at a general meeting or by taking judgment against the company by consent or by estoppel. In construing the objects and the clauses of the Memorandum of Association, the ordinary rules of construction of documents are equally applicable. There is no special rule of interpretation by reference to what are supposed to be the main or principal objects of a company where the question is whether something done or proposed to be done is *ultra vires*.

[47] As I have stated earlier, until cl. 32(i) of the Memorandum and Articles of Association is amended, the consent of the court could not be waived. Any waiver would be *ultra vires* of the Memorandum and Articles of Association and as such would be invalid.

Whether Decision Of SP4 And SP5 And The Other Members Of The Building Sub-committee Bind The Respondent

[48] Sometime before the AGM held on 26 June 1994, SP4 succeeded at an EGM held earlier to change the status of the building sub-committee to a permanent sub-committee and moved it out under the control of the management committee. He also

succeeded in making himself as the permanent chairman of the building sub-committee. In my view, he did this because he knew that after the AGM held on 26 June 1994, he would be replaced as President of the Association, and this was made clear by the declaration of SD1 that SD1 challenged him for the post of President. The evidence shows that SD1 did not like the way SP4, being the chairman of the building sub-committee, handled the sub-committee. SP4 then made the move and succeeded in creating the permanent sub-committee and at the same time stopping SD1 from being the chairman. Though SP4 succeeded in doing so, it is clear under the Memorandum and Articles of Association of the respondent, a sub-committee would still be under the control and direction of the management committee immaterial whether it is permanent or otherwise. From the chronology, on 7 July 1994, SD1 replaced SP4 as the chairman of the management committee. On 14 September 1994, SP4 declared that the building sub-committee had accepted the second agreement. I am at a loss as to how the second agreement came into being because there was no evidence of the first and second agreements. If it means the second draft by SD2, it is in evidence that P & M had rejected it.

[49] The learned judge in his judgment dealt correctly with the issue of the building sub-committee being a permanent sub-committee. The learned judge stated the hierarchy of the respondent in accordance with its Memorandum and Articles of Association which I have stated earlier. At the end of it the learned judge came to the conclusion that the building sub-committee could not operate independently of the management committee. I am in full agreement with the learned judge. There is no provision under its Memorandum and Articles for the establishment of any sub-committee independently of the management committee. Until the Memorandum and Articles of Association is amended to allow a sub-committee independently of the management committee, the establishment of a sub-committee independently of the management committee would be *ultra vires* of the Memorandum and Articles of Association. The learned judge came to the conclusion that the building sub-committee (being a sub-committee) could not act independently of the management committee. For that reason ,the declaration by SP4 that the building sub-committee had accepted the second agreement would not be binding on the management committee or the respondent

[50] Despite the declaration, the management committee on 30 December 1994 wrote to the building sub-committee seeking its comments on the offer made by Penas and Paradise. On 10 January 1995, SP4 wrote back to the management committee requesting Penas to make a fresh offer. In the same letter, SP4 requested the management committee to look into the legal implications in not proceeding with the MOU signed by the appellant. At the EGM held on 7 May 1995, SD1 as chairman of the management committee took the stand that the MOU was spent. Since SD2 had on behalf of the appellant terminated the contract, a formal agreement had not been executed and the terms and conditions have not been fulfilled. SP4 took the stand that the MOU was the contract. The members attending the EGM resolved that the MOU was not binding. This shows that the building sub-committee though said to be permanent has no power to make any declaration.

[51] Apparently, SD1 managed to remove the permanent status of the building sub-committee and placed it back under the management committee when the chairman of the management committee shall be the chairman of the building sub-committee.

The Position Of The Permanent Building Sub-committee In Dealing With The Appellant

[52] The appellant contended that the building sub-committee was turned into a permanent sub-committee and totally independent of the management committee. On that ground the building sub-committee on its own can now act on behalf of the Association (respondent) to negotiate and deal with the appellant. Since the building sub-committee had agreed with the appellant that the MOU was the agreement between them there was a binding contract between the parties. When the management committee terminated the MOU, the termination was null and void and as such the Association was liable for the breach.

[53] As I have stated earlier, the learned judge held that the building sub-committee could not act independently of the management committee. I agree with the findings of the learned trial judge. There is no doubt that SP4 managed to move the building sub-committee out of the control of the management committee through an EGM, but there is no provision in the Memorandum and Articles of Association for an independent sub-committee. All the sub-committees are created by the management committee as and when it is necessary. The idea of the sub-

committees is to help the management committee in the day to day business of the respondent. The word sub-committee indicates that it is subject to the control of the management committee who is responsible to the respondent. It was SP4 who manipulated the whole thing in order for him to remain in control of the building project and towards that end he managed to make himself and the members of the building sub-committee as permanent members. SP4 gave evidence that when the building sub-committee became permanent, its members cannot be removed by the management committee or by the Association at its general meeting. This was the power he sought to hold in order to help the appellant. There was one thing SP4 forgot to do and that was to make provisions in the Memorandum and Articles of Association for the creation of a permanent building sub-committee. As it is the Memorandum and Articles of Association does not have any provision in respect of the permanent building sub-committee. The building sub-committee is only a creation of the management committee. For that reason, the learned judge was right in holding that the creation of the permanent building sub-committee did not change its status. It remained under the control of the management committee in accordance with the Memorandum and Articles of Association. For that reason, that committee has no power to enter into any contract and if it does so then that contract would be null and void.

[54] It is significant to note that SP4 admitted that he was the author of the MOU which was signed by the appellant. In that MOU it was made clear that the consent of the court was to be obtained and that a formal agreement had to be executed. Despite the non fulfilment of those terms and conditions, SP4 as chairman of the building sub-committee declared the MOU to be a binding contract. Obviously this was done without the blessing of the management committee. SP4 went against the terms and conditions he himself imposed when the prepared the MOU. The evidence clearly shows that SP4 was more interested to help the appellant rather than protecting the interests of the respondent of which he was the President. If I am not mistaken, it is stated in the MOU that once a formal agreement has been reached, the appellant woud be given the right to charge the subject land to any financial institution.

Was There A Contract Created By The Conduct Of The Parties And Is The Respondent Estopped From Denying The Contract?

[55] The evidence shows that there were only two persons amongst the members of the respondent who had direct dealings with the appellant and they were SP4 and SP5. There was no evidence to show that other members of the respondent had any dealing with the appellant. Admittedly, at the material time, SP4 was the President of the respondent and SP5 was a member of the building sub-committee, but in dealing with the appellant they were members of the building sub-committee. The appellant's counsel in his submissions listed ten instances of conduct pointing to the fact that an agreement was reached. It is clear that they were the conduct of SP4 and SP5 and even that it was shown only during the trial. SP4 and SP5 were the witnesses for the appellant. Could that conduct be the conduct of the members of the Association and the management committee? In fact, SD1 who was a member of the building sub-committee opposed the dealings made with the appellant. Another member of the building sub-committee, who was co-opted, stated that a quantity surveyor should be named to assess the value of the building project before an agreement could be executed, but this was ignored by SP4. For that reason, the conduct of SP4 and SP5 could not be said to be the conduct of the building sub-committee what more the management committee and the respondent. For that reason, the doctrine of estoppel cannot apply to the present case.

Did SD1 Conspire To Scuttle The MOU?

[56] The appellant contended that SD1 resigned from the building sub-committee and did not contribute to the project and yet a year later he offered himself to be the Pesident of the Association. I believe there is nothing wrong about this. In fact, it shows that SD1 was not happy with the way SP4, being chairman of the building sub-committee, was showing so much favour to the appellant at the expense of the respondent. For that reason, he resigned from the building sub-committee and declared himself to be a candidate for the President in the next election. His intention was noble in that he wanted to straighten those wrongdoings committed by SP4. SP4 knew about this and because of that he made the building sub-committee into a permanent sub-committee. There is no evidence to show that SD1 scuttle the MOU. On the other hand, SD1 insisted that the terms and conditions contained

in the MOU must be followed and adhered to in order for the MOU to be operative and effective. SD1 was not happy that SP4 did not terminate the MOU when P & M informed SP4 that the appellant had aborted the agreement which should be the only course. There is no evidence to support the appellant on this issue.

Conclusion

[57] For the reasons I have stated above, I see no merit in the appellant's appeal. I would, therefore, dismiss the appeal with costs. The deposit is to be paid to the respondent to the account of taxed costs.

[58] My learned brothers, Denis Ong Jiew Fook and Mohd Noor Abdullah JJCA, have seen this judgment in the draft and they have conveyed their agreement.